United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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NULANKEYUTMONEN NKIHTAQMIKON; DAVID MOSES BRIDGES; VERA J. FRANCIS; HILDA LEWIS; DEANNA FRANCIS; REGINALD JOSEPH STANLEY; MARY BASSET, Appellants, v. EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Order Lifting Stay in Docket No. IBIA 09-07-A and for Supplemental Briefing in Docket Nos. IBIA 09-07-A and IBIA 10-138 Docket Nos. IBIA 09-07-A IBIA 10-138
QUODDY BAY LNG, Appellant, v. ACTING EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	October 4, 2012

These two related appeals[1] to the Board of Indian Appeals (Board) both concern a ground lease (Lease) between the government of the Pleasant Point Reservation of the Passamaquoddy Tribe (Tribe) and Appellant Quoddy Bay LNG (Quoddy Bay) to be used for the development and operation of a liquified natural gas terminal facility (LNG Project). Appellants Nulankeyutmonen Nkihtaqmikon (NN), et al., appealed from the June 1, 2005, decision of the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to approve the Lease and their appeal has been stayed, pending NN's efforts to challenge the approval in Federal court and most recently pending the resolution of

[1] These appeals have not been nor are they now consolidated.

Quoddy Bay's appeal. Docket No. IBIA 07-09-A. Quoddy Bay appeals from the Regional Director's July 29, 2010, decision on reconsideration of his earlier decision to cancel the Lease, which followed the Tribe's decision to terminate the Lease. Docket No. IBIA 10-138.

For reasons that will become apparent herein, the Board lifts the stay in NN's appeal, IBIA 09-07-A, and requests supplemental briefing in both of these appeals from the parties on whether these appeals are now moot.

Background

Some history is appropriate here. As mentioned above, on June 1, 2005, the Regional Director approved the Lease between the Tribe and Quoddy Bay for the purposes of "the development, construction, operation, maintenance, repair, removal, and demolition of an LNG (liquefied natural gas) terminal facility and associated improvements." Lease at 1 (AR[2] 1). Shortly after the Regional Director approved the Lease, NN challenged the Regional Director's approval of the Lease in Federal district court. *Nulankeyutmonen Nkihtaqmikon v. Impson*, 462 F.Supp. 2d 86 (D. Me. 2006) (*NN I*). After the district court's second dismissal of NN's suit for failure to exhaust administrative remedies, *Nulankeyutmonen Nkihtaqmikon v. Impson*, 573 F.Supp. 2d 311 (D. Me. 2008) (*NN III*),[3] NN filed its appeal with the Board, where it has been stayed pending the outcome of NN's Federal litigation and Quoddy Bay's appeal to the Board.

In 2009, BIA conceded in the litigation that, under the governing regulations, the Regional Director's approval "decision was and is presently inoperative," "did not become operative under BIA regulations," and the Lease itself "is now inoperative." *Nulankeyutmonen Nkihtaqmikon v. Impson*, 585 F.3d 495, 499 (1st Cir. 2009) (*NN IV*) (emphasis in the original).[4] The First Circuit, after rejecting NN's opposition to BIA's

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[2] We will refer to the administrative record as "AR." All citations herein to the AR refer to the administrative record received by the Board in Docket No. 10-138.

[3] NN's first suit was dismissed on ripeness and standing grounds based on BIA's argument that its approval was conditional and limited to site inspection to determine the feasibility of the LNG Project. *NN I*. This decision was reversed on appeal after BIA conceded that its approval was not conditional. *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007).

[4] Initially, BIA had argued that "it considered the ... [L]ease effective and binding [on] the date it was signed." *NN III*, 573 F.Supp. 2d at 323 & n.11. Thus, there was some confusion over the distinction between the "completeness" of BIA's approval and the "operativeness" or "effectiveness" of the Lease. As the district court explained, despite the

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position, affirmed the district court's decision to dismiss NN's suit for failure to exhaust administrative remedies. *Id.* at 500.

In the meantime, however, and following an unsuccessful "dispute" meeting between the Tribe and Quoddy Bay, the Tribe reported to BIA that it had informed Quoddy Bay that it "considered the [L]ease to have expired and to have no legal or equitable force or effect." AR 7, Ex. A at 3. In June 2009, the Tribe formally notified the BIA that the Tribe "had terminated the [L]ease." *Id.*

Thereafter, in February 2010, BIA issued a "Notice of Lease Violation," which ultimately led to the Regional Director's decision to "cancel" the Lease. That decision, or more specifically, the Regional Director's decision on reconsideration of his decision to cancel the Lease, is the subject of Quoddy Bay's appeal. In responding to BIA's violation notice, Quoddy Bay argued that it could not be in material breach of the Lease because a combination of actions resulted in BIA "not approving the [L]ease as required by the Lease Agreement." Letter from Quoddy Bay to BIA, Apr. 28, 2010 (AR 3); *see also* Letter from Quoddy Bay to BIA, Mar. 5, 2010 (AR 3, Attach.) (referring to "lack of approval" of the Lease" and "failure to approve the [L]ease"). In his July 29, 2010, decision, the Regional Director, in effect, reconsidered his decision to cancel the lease, rejected Quoddy Bay's response, and affirmed his decision to cancel the Lease. AR 8.[5] Quoddy Bay then appealed the Regional Director's reconsideration decision to the Board where it is now under active consideration. Throughout these proceedings to cancel the Lease, the appeal to the Board by NN from the Regional Director's approval of the Lease has been stayed.

Order for Supplemental Briefing

Several bedrock principles would appear to render moot both of these appeals on the basis that the Tribe withdrew its consent to the Lease before the Lease became effective as a matter of law. First, no lease of Indian trust land is valid in the absence of approval of the

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Lease's language concerning the effective date of the Lease, if 25 C.F.R. § 2.6(b) "stays the effective date of the [L]ease, the regulation necessarily trumps the terms of the [L]ease, regardless of what the [L]ease says," *id.* at 323, and, as the U.S. Court of Appeals for the First Circuit aptly put it, "[a]n agency decision can be completed but ineffective pending further review at a higher agency level or in court," *NN IV*, 585 F.3d at 499.

[5] The Regional Director characterized his decision as a denial of reconsideration. However, he *did*, in fact, consider the arguments raised by Quoddy Bay in its March 5 Letter, found them unsupported, and left intact his decision to cancel the Lease. AR 8 at 2, 3. Thus, it appears that the Regional Director granted reconsideration and affirmed his decision to cancel the Lease.

lease by the Secretary of the Interior, acting through BIA. *See* 25 U.S.C. § 415(a); 25 C.F.R. Part 162; *Biegler v. Great Plains Regional Director*, 54 IBIA 160, 164 (2011); *HCB Industries, Inc. v. Muskogee Area Director*, 18 IBIA 222, 225 (1990). Second, a BIA decision, including a decision to approve a non-agricultural lease, is not final during the appeal period and during the pendency of an appeal, unless otherwise provided by law. *See, e.g.*, 25 C.F.R. § 2.6(b); 43 C.F.R. § 4.332(a); *Spicer v. Eastern Oklahoma Regional Director*, 50 IBIA 328, 331 (2009); *Iron v. Acting Rocky Mountain Regional Director*, 51 IBIA 264, 266 n.5 (2010).[6] Third, a BIA official lacks authority to make his or her own decision effective immediately. *See* 25 C.F.R. § 2.6(a); *Gavilan Petroleum, Inc. v. Acting Phoenix Area Director*, 25 IBIA 300, 303 n.2 (1994); *French v. Aberdeen Area Director*, 22 IBIA 211, 215 (1992). Fourth, where BIA has not approved a lease or other conveyance of land, an Indian landowner retains the right to revoke consent to the lease or other conveyance. *Biegler*, 54 IBIA at 164; *Barber v. Western Regional Director*, 42 IBIA 264, 266 (2006).

Applying these principles to the facts of this case, it appears that the Regional Director's approval decision has never become final, the Lease itself thus has never gone into effect as a matter of law, and thus the Tribe retained the right to revoke its consent to the conveyance of a leasehold interest to Quoddy Bay. Although the Tribe, Quoddy Bay, and BIA all proceeded as though the Lease had become effective, none had legal authority to make it so, and the Tribe's purported "termination" of the Lease would appear to be the functional equivalent of a revocation of consent. The effect of this revocation, then, would appear to render moot any action by BIA, including the approval of the Lease and BIA's cancellation of the Lease, and moot the appeals challenging these actions.

Therefore and in light of the above, the stay in NN's appeal, Docket no. 09-07-A, is lifted, and briefing is solicited from the parties on the issue of whether these two appeals are now moot. Simultaneous briefs shall be filed on or before November 1, 2012. Optional answer briefs shall be filed on or before November 19, 2012. The Tribe is invited to participate in the briefing.

Debora G. Luther
Administrative Judge

Distribution: See attached list.

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[6] In contrast, the regulations specifically place agricultural leases into immediate effect upon approval of the leases by BIA. *See* 25 C.F.R. § 162.216. The absence of a similar regulation for non-agricultural leases, such as the Lease between the Tribe and Quoddy Bay, only underscores the Lease's lack of finality.

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